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In the

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA), NATIONAL FEDERATION OF THE BLIND (NFB), *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted by the National Employment Lawyers Association (NELA), the National Federation of the Blind (NFB), the American Diabetes Association and the American Association of University Professors (AAUP).

NELA, a voluntary membership organization exceeding 3,000 attorneys, is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before this Court regarding the proper interpretation and application of employment discrimination laws to insure that these laws are fully enforced and that the rights of workers are fully protected. NELA participated as amicus curiae in the lower court's decision, *Garrett v. University of Alabama Bd. of Trs.*, 193 F.3d 1214 (11th Cir. 1999). Given NELA's extensive *amicus* participation in some of the most important decisions concerning Eleventh Amendment immunity and employee rights, NELA desires to offer its input on this very important issue.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than the *amici curiae*, their members, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

NFB, the leading national organization of blind persons, has affiliates in all 50 states, the District of Columbia and Puerto Rico. The vast majority of the Federation's approximately 50,000 members are blind. The NFB is widely recognized by the public, Congress, executive agencies of government, and the courts as a collective and representative voice of blind Americans and their families. The NFB seeks to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life, including employment, education, family and community life, transportation and recreation. The NFB has long been actively involved in promoting equality of opportunity in employment through training, litigation and advocacy.

The American Diabetes Association is the leading advocacy group for advancing the employment rights of persons with diabetes. The Association was one of the leading organizations lobbying for passage of the Americans with Disabilities Act (ADA) and has provided technical support to the Equal Employment Opportunity Commission in promulgating regulations and guidelines to apply the Act to employment situations. The Association has been an active advocate in persuading government agencies to revise employment regulations that undercut the employment rights and remedies of people with diabetes. The Association has played a variety of roles in cases throughout the country, including filing *amicus curiae* briefs before this Court, and serving as a party-plaintiff when the civil rights of persons with diabetes have been violated.

AAUP is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Among the organization's central functions is the development of policy standards for the protection of academic freedom, tenure, and other elements of higher education, including the ability of professors who work for state universities to seek judicial redress for civil rights violations, such as disability discrimination. *See, e.g., On Discrimination,* AAUP Policy Documents & Reports (1995 ed.). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972). AAUP has participated as *amicus* in other sovereign immunity cases threatening the civil rights of professors who teach at public institutions. AAUP is concerned that holding public entities, such as state universities, immune from the ADA will impair the ability of professors and academic professionals to protect themselves from disability discrimination in the workplace.

SUMMARY OF ARGUMENT

Section 5 of the Fourteenth Amendment empowers Congress "to enforce, by appropriate legislation" the mandates of its first section, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This grant permits Congress to "remedy and deter" unconstitutional acts that violate Section 1, as well as "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 644 (2000). While Congress has "wide latitude" in defining the bounds of the latter through prophylactic legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Thus, relevant to determining whether Congress has acted within the bounds of Section 5 is an understanding of the extent and nature of the "injury to be prevented" by the ADA. This brief demonstrates that before and after the ADA's enactment, there has existed a widespread pattern of unconstitutional discrimination in the employment arena by governmental agencies against disabled persons. Because Congress was confronted with a "widespread and persisting deprivation of constitutional rights," *id.* at 526, it properly enacted Section 5 legislation—the Americans with Disabilities Act—to remedy this evil.

Section I, *infra*, first establishes that stigma and stereotype are the unconstitutional sources of discrimination by public employers against disabled persons and then demonstrates how arbitrary and irrational state conduct has affected all disabled persons. Section II, *infra*, delineates instances of unconstitutional governmental actions that have affected the employment of persons with particular disabilities.

ARGUMENT

I. Stereotypes and Stigmatization—Barriers to Employment of the Disabled—Exist in the Public Sector and Violate the Equal Protection Clause.

The principal barriers to employment for persons with disabilities arise not from the nature of their disabilities, but from (1) stereotypes that equate disability with incapacity and that are grounded in unfounded assumptions and (2) baseless fears or repulsion, that is, stigmatization. States and other public employers have acted on the prejudices endemic in society at large.[2] As this Court noted in the context of Section 504 of the Rehabilitation Act, applicable to certain public sector employment, "Congress [there] acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987). Governmental decisions about persons with disabilities based on myths or unfounded fears violate the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432, 450 (1985).

Discrimination based on stigma arises particularly for persons with diseases or with visible disabilities. For example, in a survey cited in a congressionally auth-

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[2] Many instances of discrimination by municipalities and counties flow from their application of state laws or regulations. Moreover, because there is no basis to suppose that states will operate differently in this regard from subordinate governmental entities and because a state job in one jurisdiction may be a county or local one in another, this brief describes instances of unconstitutional discrimination in the public sector at all levels.

orized study, employers reported that paraplegics were best suited for jobs with a minimum of public contact because of the public's reaction to the disability. Felton & Litman, *Study of Employment of 222 Men with Spinal Cord Injury*, 46 Archives of Physical Med. & Rehab. 809 (1965).[3] As early as 1943, members of Congress took note of the problem of stigmatization, recognizing that the visibility of a disability, rather than its impact on job performance, is often a barrier to employment.[4]

Congress also recognized that stereotyping can bar disabled persons from work that they are competent to perform.[5] As Congress heard again in 1973, "[t]oo

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[3] Cited in Urban Institute, *Report of the Comprehensive Service Needs Study* at 321 n.32 (1975). Congress had authorized the study as part of the Rehabilitation Act of 1973 and heard its results in 1976. *See Rehabilitation of the Handicapped Programs 1976: Hearings before the Subcomm. on the Handicapped of S. Comm. on Labor and Public Welfare*, 94th Cong. 629-62 (1976) (testimony of Jerry Turem, chief author of the *Needs Study*).

[4] "There are individuals who have facial or other disfigurements that are a little repulsive to the public. They cannot get or hold a job unless they are given plastic operations or prosthetic devices which can correct most of the disfigurement. Often that alone enables them to resume their former occupations." Rep. Walter Judd, regarding the Barden-LaFollete Amendments to Rehabilitation Act, 89 Cong. Rec. 5660 (1943) [hereinafter *Barden-LaFollette*].

[5] "When we speak of the blind, we immediately picture a figure in dark glasses standing at a street corner with a tin cup. In the face of the present shortage of manpower for essential war industries, we are just beginning to become aware of a reservoir of competent, dependable labor that has

(continued...)

frequently, public attitudes and popular misconceptions about the 'helplessness' of the handicapped present individuals with far more formidable vocational obstacles than do the physical disabilities such individuals might actually have sustained."[6]

Statistics demonstrate the nature and sweeping effect of employment discrimination by the states. In April 1989, the Advisory Commission on Intergovernmental Relations (ACIR) reported that "[n]ot working is perhaps the truest definition of what it means to be disabled." *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 18 (April 1989). Over four-fifths of the state government representatives surveyed believed that negative attitudes and misconceptions had a moderate to strong impact on the ability of disabled persons to secure state employment. *Id.* at 72. At the root of these attitudes, state employers reported, were "feelings of discomfort in associating with disabled individuals" and "inaccurate assessments of their productivity." They acknowledged that "negative attitudes persist, despite evidence that handicapped workers are productive." *Id.* at 73.

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[5] (...continued)
been waiting for an opportunity to become useful—the blind workers of this country. . . . The real man is often masked behind his physical handicap. . . ." *Barden-LaFollette, supra* note 4, at 5664 (statement of Rep. William Troutman).

[6] *Randolph-Sheppard Act for the Blind Amend. of 1973 Hearings on S. 2581 before the Subcomm. on the Handicapped Labor & Public Welfare Comm.* 93d Cong. 66 (1973) [hereinafter *Randolph-Sheppard Hearings*] (testimony of Charles W. Hoehne).

A study issued shortly after the passage of the ADA reported that New York state employees "confront disabilities with stereotypes, ignorance, misinformation, fear, and pity that impede progress toward equal opportunity," and concluded that "cultural attitudes toward disability are the most enduring barriers to the full participation of people with disabilities in society."[7]

In the face of such widespread discrimination, complaints against public sector employers have been overwhelming. In September 1977, the Director of the Justice Department's Office for Civil Rights explained to a House Subcommittee that disability discrimination complaints filed under Section 504 of the Rehabilitation Act of 1973 were increasing sharply. The majority of these complaints concerned employment discrimination by governmental entities, including school districts, colleges and universities, health facilities and social service agencies, and involved failures to hire or rehire, dismissals, suspensions, and failures to promote. These complaints were so numerous that they were beyond the ability of the Justice Department to handle.[8]

The states have also discriminated against persons with disabilities in training for employment. For example, the Comprehensive Employment and Training Act (CETA) was enacted to provide programs to train the

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[7] Sharon L. Harlan & Pamela M. Robert, *Disability in Work Organizations: Barriers to Employment Opportunity*, Final Report at xiii, State Univ. of New York, Albany (1995).

[8] *Implementation of Section 504, Rehabilitation Act of 1973: Hearings before the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 95th Cong. 302-303 & 317 (1977) [hereinafter *Section 504 Hearings*] (statement of David Tatel).

unemployed. But as Congress was advised, the programs run by governmental entities shunned the disabled.[9] On a nationwide basis "handicapped men and women made up . . . less than 3% of those [enrolled] in public service jobs under titles II and VI" of CETA.[10] Program operators, Congress was told, were "reluctant to deal with handicapped persons because they feel uncomfortable or don't know how to respond. They may have unpleasant feelings of pity, helplessness, fear, or revulsion."[11]

The CETA experience is in no way a localized problem. Negative stereotypes of the disabled as incapable infect the very state rehabilitation agencies charged with assisting the disabled with employment. One witness before Congress described the mindset so often typified by state rehabilitation agencies:

> Disability has all too often been equated with lack of ability. Untested assumptions are evident, and stereotyping has hidden the characteristics and abilities of persons with disabilities under the blanket of these assumptions. As a result, low

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[9] *Oversight Hearings on the Rehabilitation Act of 1973: Hearings before the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 95th Cong. 368 (1978) [hereinafter *Oversight Hearings*] (statement of T.P. Hipkins).

[10] *Id.*

[11] *Id.* at 369. Over twenty years later, the Mendicino County Department of Social Services routinely diverted disabled applicants from the County work program and directed them to apply for SSI benefits. *OCR Significant Cases, Americans with Disabilities Act: TANF, U.S. Dept. of Health and Human Services*, Office of Civil Rights, (March 2000) *Available at* http://www.hhs.gov/progorg/ocr/casesum.html.

> expectancy is perhaps the single most critical deterrent to success for persons with disabilities. An expectancy cycle has been established that perpetuates low levels of success and low functional employment capabilities.[12]

Thus, one state vocational rehabilitation agency refused to provide education and training to an individual paralyzed from the neck down, because "they did not see any reason" to get him off the SSI benefit rolls.[13] A spokesperson for the deaf explained

> that to be served by [state] rehabilitation agencies for some disability groups, the client must himself adopt the behavior and characteristics traditional to the handicap . . . . It is this insidious perpetuation of situations that in themselves are handicapping that we seek to abolish.[14]

Congress learned in 1985 of employees at the Mississippi Industries for the Blind who had been denied promotions based on their blindness.[15] A head-injured

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[12] *Oversight Hearings, supra* note 9, at 308 (statement of Ronald Torner for United Cerebral Palsy Assoc., Inc.).

[13] *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing before the Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 100th Cong. 41 (1988) [hereinafter *ADA Oversight Hearing*] (statement of Donald Levine).

[14] *Oversight Hearings, supra* note 9, at 561-62 (testimony of George W. Fellendorf).

[15] *Civil Rights Restoration Act of 1985: J. Hearings on H.R. 700 Before the H. Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the*

(continued...)

survivor testified that after he applied to work with newly head injured-persons, the State of Virginia withdrew the job announcement.[16] Tellingly, Congress heard from a blind woman that the New York State Commission for the Blind would not sponsor her for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors."[17]

Quoting a rehabilitation agency psychiatrist that "all blind persons follow a pattern of dependency," Congressman Baring remarked with respect to state rehabilitation agencies:

> Naturally it follows, for those who accept this line of reasoning, that blind people must be closely supervised and protected, not only in the specific area of need in which they may seek aid but in most aspects of their lives, and not merely for a limited period of training and assistance and virtually from cradle to grave.

105 Cong. Rec. A1006-07 (1959) (Hon. Walter S. Baring).

The following section provides a sampler of unconstitutional discrimination against persons with disabilities that arise directly from these misconceptions.

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[15] (...continued)
Judiciary, 99th Cong. 155 (1985) [hereinafter *1985 Civil Rights Hearings*] (statement of Ilene Shane).

[16] *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 before the H. Comm. on the Judiciary*, 101st Cong. 218 (1989) (statement of Geoffrey M. Baynard).

[17] *ADA Oversight Hearing*, *supra* note 13, at 195 (statement of Denise Karuth, Chair, Mass. Coalition of Citizens With Disabilities).

II. An Extensive Record Demonstrates Public Sector Employment Discrimination Against the Disabled Based on Fear, Stigma and Stereotype.

A. *Persons with Cancer Histories*

This Court has noted the irrational discrimination committed by public sector employers against persons with cancer histories: "Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious." *Arline*, 480 U.S. at 284 (citing at n. 13, *inter alia*, Senator Humphrey's remarks, 123 Cong. Rec. 13515 (1977)).

Another court has noted that there is "little question that cancer history raises barriers to employment opportunities . . . unrelated to a person's qualifications." *See, e.g., Burris v. City of Phoenix*, 875 P.2d 1340, 1344-45 (Ariz. Ct. App. 1993) (applicant for a firefighter position who had recovered from testicular cancer was arbitrarily refused employment).

In 1985 and 1987, a Congressional committee focused on employment discrimination against persons with a history of cancer. Each hearing saw dramatic statistics of employment discrimination against cancer survivors. At the first hearing, one Congressman cited a study showing that more than half of cancer patients in white collar jobs and 84% of those in blue collar occupations suffered some kind of discrimination when they returned to work, if they had work to which to return.[18] At the second, there

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[18] *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing before the House Subcomm. on Employment Opportunities of the Comm. on Educ. and Labor* (continued...)

was testimony that close to one million Americans encounter workplace discrimination after being cured.[19]

Numerous instances of irrational discrimination in the public sector against recovered cancer patients were cited at both hearings.[20] One witness, an oncologist, testified

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[18] (...continued)
on H.R. 370 and H.R. 1294, 99th Cong. 5 (1985) [hereinafter *Employ. Hearing of 99th Cong.*] (statement of Rep. Mario Biaggi).

[19] *Hearing on Discrimination Against Cancer Victims and the Handicapped: Hearing before the House Subcomm. on Employment Opportunities of the Committee on Educ. and Labor*, 100th Cong. 28 (1987) [hereinafter *Employ. Hearing of 100th Cong.*] (statement of Rep. Mario Biaggi).

[20] The examples included a 24 year-old who had been free of Hodgkin's disease and its treatment for six years, but who was denied employment as a New York City police officer because of that history; a man who was denied entry into the United States Coast Guard Reserves because of "history of cancerous tumor;" a man who was fired from his position as heavy equipment operator for the city of DeWitt, New York, even though he had recovered from leukemia and had been pronounced fully fit to work by his doctor; a recovered Hodgkin's Disease patient who was "medically disqualified" for Peace Corps Service because of his medical history; a New York City Transit Authority policeman who was denied employment with the New York City Police Department who had recovered from Hodgkin's disease, but who was rejected based on a requirement that applicants have no history of malignant tumors. *Employ. Hearing of the 99th Cong.*, *supra* note 18, at 5-9 (statement of Rep. Mario Biaggi), and at 42-44 (statement of Anthony Igneri). Additionally, a man who had recovered from Hodgkin's disease was disqualified by the New York State (continued...)

that discrimination against recovered cancer patients was "more prevalent in the public sector" than in the private: "I found more cases [of discrimination by] boards of education, . . . the military, [and] government agencies, than maybe people realize."[21]

B. *Persons with HIV*

Because human immunodeficiency virus (HIV) is transmitted only through sexual contact, invasive exposure to blood or certain other bodily fluids, or by perinatal exposure,[22] there are very few jobs in which a person with HIV risks infecting coworkers or customers.[23] Nonetheless, irrational fears among employers abound. In a recent survey funded by the National Institute of Mental Health, approximately half of the respondents believed that AIDS might be transmitted through sharing a drink-

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[20] (...continued)
Civil Service Commission from employment as a police officer based on his history of cancer, even though Sloan Kettering Memorial Hospital attested that he was in perfect health. *Employ. Hearing of 100th Cong., supra* note 19, at 61-79 (statement of Timothy Calonita).

[21] *Employ. Hearing of 99th Cong., supra* note 18, at 57 (statement of Dr. Ivan Barofsky).

[22] Centers for Disease Control and Prevention, *HIV and Its Transmission* (July 1999).

[23] HIV positive individuals can safely work in most jobs without threat of transmission. *See* Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., *Recommendations for Prevention of HIV Transmission in Healthcare Settings, 36* Morbidity & Mortality Weekly Rep. 2S, 3-4 (August 21, 1987).

ing glass, being coughed or sneezed on, or using a public toilet.[24] As a result, "[t]he public is more likely to stigmatize persons with AIDS to the extent that they believe that the virus is easily spread and that people with AIDS should be blamed for their illness."[25]

Unfortunately, public sector employers share these false perceptions. For example, in *Chalk v. United States District Court*, 840 F.2d 701, 707 (9th Cir. 1988), a teacher with AIDS was barred from his classroom due to an unfounded fear that he might transmit AIDS to his students by some heretofore unknown method of contagion, even though the employer's expert acknowledged that there was no scientific evidence of possible alternative routes for infection.[26] Congress was told of a professor of veterinary medicine at a state university who was fired because he had AIDS.[27] At least eleven states by statute deny licenses to practice various professions to persons with contagious diseases without regard to

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[24] *Nationwide Survey Finds Continuing Stigma and Misinformation About Aids*, National Institute of Mental Health (July 1, 1998).

[25] *Id.*

[26] In considering whether to enact the ADA, Congress was told of the discrimination suffered by Mr. Chalk. *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: J. Hearing before the H. Subcomm. on Employment Opportunities and Select Educ. of the Comm. on Educ. and Labor*, 101st Cong. 105 (1989) [hereinafter *1989 ADA Hearing*] (statement of Arlene Mayerson).

[27] *Americans with Disabilities Act of 1989: Hearing on S. 933 before the S. Comm. on Labor and Human Resources and on the Handicapped*, 101st Cong. 404 (1989) (statement of Nat'l Orgs. Responding to AIDS Coalition).

whether the disease is transmissible in the practice of that profession. For example, someone with HIV cannot be a hearing aid dealer in Alabama, Delaware, Kentucky, North Carolina or North Dakota,[28] or a barber in Mississippi, North Dakota, Oregon, South Carolina, Tennessee, Wisconsin or Wyoming.[29] No rational connection can be drawn between the purpose of protecting the public in the sale of hearing aids and barring persons with HIV from selling hearing aids.

C. *Persons with Epilepsy*

For at least twenty years, it has been true that 80% of epileptics have their seizures controlled by medication. Kettle & Massie, *Need a Disability Be A Handicap?* 13:2 Personnel Mgmt 32 (1981). Yet three years before the enactment of the ADA, Congress learned that 85% of people with epilepsy were unemployed.[30] Clearly, such disparate numbers reflect irrational fear is at work, even the fear that epilepsy is contagious. *See Arline*, 480 U.S. at 284.

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[28] Ala. Code. 34-14-4 (1997); Del. Code Ann. tit. 24, § 3715 (1997); 201 Ky. Admin. Reg. 7:02 (1994); N.C. Gen. Stat. § 93-D5 (1991); N.D. Cent. Code § 43-33-07(d) (1993).

[29] Miss. Code Ann. § 73-5-25(c)(1972); N.D. Cent. Code § 43-04-40 (1993); Or. Rev. Stat. § 690.075 (1989), *amended by* 1999 Or. ALS 425, 1999 Or. SB 290; S.C. Code Ann. § 40-7-240(3) (1986); Tenn. Code Ann. § 62-3-121(3) (1997); Wis. Stat. § 454.15(2)(e)(1998); Wyo. Stat. Ann. § 33-7-207 (Michie 1999).

[30] *Employ. Hearing of 100th Cong., supra* note 19, at 2 (statement of Subcomm. Chairman Matthew G. Martinez).

In *Duran v. City of Tampa*, 430 F. Supp. 75, 76 (M.D. Fla. 1977), the plaintiff sought employment as a police officer, but episodes of childhood epilepsy automatically barred him from consideration, even though he had been seizure-free for sixteen years and had not taken medication for nine. Unrebutted medical testimony established that because Mr. Duran had outgrown his childhood epilepsy, his likelihood of having future seizures was that of the general population. The court, holding that the plaintiff was likely to prevail on the merits, noted that the "public interest demands that all individuals capable of performing a particular task be placed on an equal footing." *Id.* at 78-79.[31]

Similarly, Congress heard from a woman with a Master's degree in social work whose job offer as a children's service worker for the Los Angeles Department of Social Services was withdrawn after the agency learned of her history of epilepsy, even though she had been seizure-free for eleven years.[32] Congress also heard from a volunteer juvenile group counselor with controlled epilepsy whose application for that same position as an employee was denied because of his epilepsy.[33]

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[31] Mr. Duran would fare no better today in Idaho, which requires a police officer to be free of any physical defects and chronic or organic diseases or conditions. Idaho Admin. Code 11.11.01 (2000).

[32] *1985 Civil Rights Hearings*, *supra* note 15, at 673 (statement of Julie Ann Hiller).

[33] *Civil Rights Act of 1984: J. Hearing on S. 2568 before the S. Subcomm. on Educ., Arts and Humanities and the Subcomm. on the Handicapped of the Comm. on Labor and Human Re-*

(continued...)

Even today, Massachusetts specifically bars all persons with epilepsy from being licensed as a barber, without regard to whether medication controls their seizures. Mass. Ann. Laws ch. 112, §87L (2000).

D. *Persons with Mobility Impairments*

Approximately 7.4 million Americans with mobility impairments use Assistive Technology Devices (ATDs).[34] Persons with mobility impairments are able to perform the overwhelming majority of jobs by using wheelchairs, motorized scooters, canes, braces and walkers. Nonetheless, only 22% of working-age wheelchair users and 27% of cane, crutch or walker users are employed.[35] Much of this unemployment is the product of stigma and stereotype.

In one dramatic example of stigmatization in the public sector, a physician with multiple sclerosis was denied a residency in psychiatry, because "the devastation, guilt, pity and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him." *Pushkin v. Regents of the Univ. of*

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[33] (...continued)
sources, 98th Cong. 32 (1984) [hereinafter *1984 Civil Rights Hearing*] (statement of Clarence Hart).

[34] J. Neil Russell et al., *Trends and Differential Use of Assistive Technology Devices: United States, 1994*, Advance Data No. 292 (Nat'l Ctr. for Health Statistics 1997).

[35] U.S. Census Bureau, *Survey of Income and Program Participation (SIPP)*, 1994-1995.

Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).[36]

Two examples demonstrate that even those who succeed in securing public employment are often hindered by employers' irrationality.[37] A quadriplegic psychiatrist applying for a position at a Veterans Administration Hospital in Tampa was asked, bizarrely, if he could read, write and handle a medical chart. Although he was ultimately hired, when he applied unsuccessfully some years later for a position at another VA hospital, he was told by the Chief of Psychiatry at this second institution that he had not been hired because of his wheelchair.[38] A psychologist with cerebral palsy was not invited to sit on a professional panel on the assumption that her speech would be difficult to understand—even though her speech was unimpaired. As she explained to Congress, "Early experience with agencies and institutions revealed inbred prejudices against the physically 'different' person which existed at administrative levels throughout our nation and closed doors to job opportunities to those who have

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[36] Testimony concerning this case was presented to Congress. See *1984 Civil Rights Hearing*, *supra* note 33, at 28 (statement of Arlene Mayerson).

[37] *See also Smith v. Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975), *modified*, 559 F. 2d 1014 (5th Cir. 1977) (Plaintiff with a Master's degree in physiology who was a paraplegic denied promotions by NASA and assigned menial clerical tasks because of "an arbitrary and unfounded decision as to her physical capabilities.").

[38] *Section 504 Hearing*, *supra* note 8, at 460-62 (letter from Steve Halpert, M.D.).

handicaps which are visible."[39]

Stereotypes that ascribe false significance to impairment regularly produce irrational public employer hiring decisions. For example, a teacher was denied a license because, being confined to a wheelchair as a result of poliomyelitis, she was deemed "physically and medically unsuited for teaching." *Heumann v. Board of Educ.*, 320 F. Supp. 623 (S.D.N.Y. 1970).[40] More recently, in Colorado, a teacher with muscular dystrophy who was refused a job interview at a local high school simply because he used a wheelchair, subsequently secured an injunction requiring the school district to employ him.[41] A full professor who became mobility impaired found his grants with the National Science Foundation given to others.[42]

Melvin v. City of W. Frankfort, 417 N.E. 2d 260 (App. Ct., 5th Dist. 1981) powerfully illustrates why myths persist—they seem so true to those who fail to obtain the facts about a particular disability. *Melvin* involved the

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[39] *Section 504 Hearing, supra* note 8, at 459 (letter from Barbara Hoffman, Ph.D.).

[40] The case was ultimately dismissed as moot after the defendant reversed itself, granted plaintiff a license and a position. The Senate Report on the ADA noted Ms. Heumann's experience. S. Rep. No. 116, 101st Cong. 7 (1989).

[41] *Carr v. Fort Morgan Sch. Dist.*, 4 F. Supp.2d 989 (D. Colo. 1998); *see* Jim Kirksey, *Disabled Man to Realize Dream – to Teach*, Denver Post, Aug. 26, 1998 at B-9 (identifying the nature of the disability which was unmentioned in the opinion).

[42] *Section 504 Hearings, supra* note 8, at 471 (letter from George G. Gyrisco).

unfounded assumption that a firefighter with a prosthesis below the knee would be more limited than persons without an amputation. In fact, the Fire Chief of West Frankfort attested that Mr. Melvin's performance as a volunteer fireman had been without limitation and he passed all physical requirements for employment as a firefighter. *Id.* at 261-62. Because state law barred all amputees from being employed as firefighters, the Chief could not hire him. *Id.* The court struck down the statute because it created a distinction not "based upon particularized performance related incapacities." *Id.* at 263. Similarly, a sheet metal worker who, after his amputation had plied his trade for eighteen years, was rejected for the same work by a state university, on the assumption that he could not climb scaffolding. In the face of testimony that he routinely climbed ladders and worked on scaffolds and roofs, the court concluded that the university had erred by assuming that amputees as a group were incapable of performing the work. *Board of Trs. v. Human Rights Comm'n,* 485 N.E.2d 33, 36 (Ill. App. 4th 1985).

In Kentucky, a state regulation precluded anyone "who does not possess both of his natural legs" from driving a school bus. 702 Ky. Admin. Reg. 5:080(1) (1999). Again, an unfounded assumption was in play when a local school district refused to hire the plaintiff, whose leg had been amputated. However, when capacity became an issue of fact, the court struck down the statute, because the evidence was undisputed that he was "a highly competent bus driver who is not hindered at all by his prosthesis . . . and is well-qualified for the position he seeks." *Coleman v. Casey Bd. of Educ.*, 510 F. Supp. 301, 303

(W.D. Ky. 1980).[43]

E. *Persons with Diabetes*

As of 1993 there were approximately 14 million Americans with diabetes.[44] Although the Court said in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), that many who have diabetes are unimpaired in major life activities, state employers nonetheless engage in arbitrary discrimination by stereotyping all persons with diabetes without regard to whether their disease is under control. A bus driver whose diabetes had been under control since shortly after her diagnosis was barred from employment by a Pennsylvania regulation that forbids persons with diabetes who use medication from working as school bus drivers. *Commonwealth v. Tinsley,* 564 A.2d 286 (Pa. Commw. 1989). Although the court held the regulation unlawful, it has not been repealed. 67 Pa. Code

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[43] As licensors, states also discriminate by imposing across-the-board requirements of physical soundness without regard to whether a disability relates to the performance of an occupation. North Dakota requires that all nursing home administrators be "of sound physical and mental health." N.D. Cent. Code §43-34-03 (2000). In Connecticut, a variety of licenses may be suspended or revoked for any physical illness, without regard to its impact, *vel non*, on the license holder's performance of these professions. Conn. Gen. Stat. 385 § 20-227 (1999) (funeral home director); Conn. Gen. Stat. 371 § 20-29 (1999) (chiropractor); Conn. Gen. Stat. 384 § 20-202 (1999) (veterinarian); Conn. Gen. Stat. 386 § 20-238 (1999) (barber); Conn. Gen. Stat. 387 § 20-263 (1999) (hairdresser and cosmetician).

[44] Maureen J. Harris, *Summary, in* DIABETES IN AMERICA 1 (National Institutes of Health, NIH Publication No. 95-1468 2nd ed., 1995).

71.3(b)(4) (1998). A similar regulation in Wisconsin was struck down in *Bothum v. Department of Transp.*, 396 N.W.2d 785,786 (Ct. App. Wisc. 1986), under a state law that embodied the essence of Equal Protection analysis—that is, the regulation was not reasonably related to the person's ability to perform the job.

F. *Hearing Impairments*

Hearing loss affects nearly 10% of the U.S. population. About one and a half million Americans are deaf. When those who are deaf can secure work, employers frequently rate deaf and hard-of-hearing workers as better or about the same in task performance as hearing coworkers.[45] But often employers impose standards for aural acuity unrelated to job performance. For example, a deputy sheriff was discharged for a mild hearing loss that did not affect his ability to carry out his job.[46] Similarly, the City of Fairfax, Virginia utilized a national standard for hearing loss for firefighters that did not relate to the ability of the individual firefighter to perform.[47]

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[45] Cornell University, *Implementing the Americans With Disabilities Act: Working Effectively with Persons who are Deaf or Hard of Hearing* (April 1994).

[46] *In Re El Dorado County Sheriff's Dep't*, 1979 CAFEHC LEXIS 8 (Ca. F.E.H.C. Sept 6, 1979).

[47] Press Report, U.S. Department of Justice, Civil Rights Division, *Enforcing the ADA: A Press Report from the Dep't of Justice for the Mid-Atlantic Region,* available at http://www.usdoj.gov/crt/ada/pubs/reg3rpt.htm. (last updated June 27, 2000).

G. *Persons with Vision Impairments*

About 1 million Americans are considered legally blind.[48] Alternative techniques for performing tasks that do not rely on sight have made it possible for blind persons to perform most workplace tasks.

> It is no longer theory but established fact that, with proper training and opportunity, the average blind person can do the average job in the average place of business—and do it as well as his sighted neighbor . . . the skills of independent mobility, communication, and the activities of daily living are known, available, and acquirable.[49]

Despite the fact that the blind can hold most jobs, unfounded stereotypes persist. "In other words the real problem of blindness is not the blindness itself—not the acquisition of skills or techniques or competence. The real problem is the lack of understanding and the misconceptions which exist."[50]

While those with no mobility impairments can easily picture the utility and limitations of a wheelchair, sighted people often incorrectly assume the absence of non-visual alternative techniques to perform tasks for

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[48] Estimates of persons in the United States who are legally blind—defined as having corrected vision which is worse than 20/200—range from 750,000 to 1.1 million. *See* Yen-Pin Chiang, et al., *Federal Budgetary Costs of Blindness*, 70-2 The Millbank Quarterly 319-340 (1992).

[49] Kenneth Jernigan, *Blindness—Concepts and Misconceptions*, The Braille Monitor, 76 (Aug. 1965).

[50] *Id.*

which people with vision rely on sight. In noting that the paternalism of rehabilitation agencies is most severe with respect to the blind, one Congressman explained,

> blindness . . . is regarded almost universally as qualitatively different and far more crippling in its consequences than the run of physical disabilities or social disadvantages.

105 Cong. Rec. A1006-07 (1959) (Hon. Walter S. Baring).

The pervasiveness and persistence of these stereotypes are such that many sighted people would be surprised to discover that blind people safely use chain saws, scale cliffs and barbecue over hot coals.[51]

In the context of amendments to the Randolph-Sheppard Act, 20 U.S.C. §107(2000), one witness captured the vicious cycle that misconceptions about the blind have created:

> popular misconception about the 'helplessness' of blind persons . . . had existed for thousands of years. The misconceptions amounted to a self-fulfilling prophecy: Most people thought the blind were fit for little more than mendicancy; as a result of this attitude, the blind were not given the same employment opportunities as the sighted; and as a result of the lack of opportunities, all too many blind persons did in fact end up being dependent upon charity—or upon public welfare programs.

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[51] *See* Marc Maurer, *Children and Chain Saws*, *in* To Touch the Untouchable Dream 21 (Kenneth Jernigan, ed. 1993); Barbara Pierce, *Climb Every Mountain*, *in* Making Hay 109 (Kenneth Jernigan, ed. 1993); Marc Maurer, *Reflecting the Flame* 1 (1999).

> Franklin Roosevelt [who signed the Randolph-Sheppard Act] knew that this popular attitude was wrong and that there was no substantial or necessary basis for the myth about the 'helplessness' of the blind.[52]

The Philadelphia school system prohibited a blind English teacher from applying to teach sighted students. The Third Circuit concluded that her Fourteenth Amendment rights had been violated, noting that "[t]he very point of this case is that [by] denying [plaintiff] the opportunity to take a qualifying exam, the defendants deprived her of the opportunity to present evidence of her qualifications."[53] In 1978 the Supreme Court of Connecticut held unlawful the refusal of a school district to hire a blind teacher's aide pursuant to a policy which required teachers to have 20/20 vision. The decision, although on state law grounds, cast the school district's error in classic Fourteenth Amendment grounds: "classifying individuals by means of criteria irrelevant to the ultimate end sought to be accomplished . . . ."[54]

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[52] *Randolph-Sheppard Hearing, supra* note 6, at 63-64 (Charles W. Hoehne).

[53] *Gurmankin v. Costanzo*, 556 F.2d 184, 187 n.5 (3d Cir. 1977). While *Gurmankin* was decided under the irrebuttable presumption doctrine of *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974), a doctrine of debatable scope and vitality, the Third Circuit later noted that the Philadelphia school board's policy violated the Fourteenth Amendment, because it "was not rationally related to the legitimate state goal of assuring teacher competence." *Malmed v. Thornburgh*, 621 F.2d 565, 575 (3d Cir. 1980).

[54] *Connecticut Inst. for the Blind v. Connecticut Comm'n on Human Rights and Opportunities*, 405 A.2d 618, 621 (1978).

Discrimination flourishes, even in our legal institutions. Congress heard in 1985 about a blind lawyer who had worked for the Los Angeles County District Attorney's Office as a Senior Law Clerk. While Senior Law Clerks were hired with the understanding that those who passed the bar and had performed competently would be offered positions as Deputy District Attorneys, this lawyer was told that he would not, because he was blind.[55]

Richardson v. Purvis, 402 So.2d 910 (Ala. 1981) demonstrates well the irrationality that persons with disabilities so often face. The Sheriff of Mobile County hired a corrections officer, knowing he was blind in one eye. The officer had already performed this job for several years before the institution of a merit system, and all agreed that his loss of vision had had no detrimental effect on his performance. Even though the Sheriff believed, the County's examining physician concurred, and the "evidence was uncontradicted that Tillman's loss of vision . . . did not affect his ability to perform the duties of a correction officer," *id.* at 911, the personnel director of the county refused to affirm the hiring because of medical standards adopted by the Board to the contrary.

The impact of prejudice is severe: nearly three-quarters of working-age blind who want to work are unemployed.[56]

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[55] *1985 Civil Rights Hearings*, *supra* note 15, at 656-57 (statement of Stanley Fleishman).

[56] "Blind people today work as lawyers, psychologists, machinists, farmers, and hairdressers; but the best estimates indicate that 70% of those who are able to work still do not have jobs or work only a few days a month in sheltered workshops. Many

(continued...)

CONCLUSION

The experiences recounted here of irrational discrimination by public employers against persons with disabilities are, unfortunately, not anomalies. As different as these persons, their disabilities and their experiences are from each other, they all fall within a pattern of "discriminatory practices based on unfounded, outmoded stereotypes and perceptions and deeply embedded prejudices toward disabled people."[57] In testimony addressing the proposed Americans with Disabilities Act, Arlene Mayerson identified with precision the nature of this prejudice: "Over the years, the view of disabled people as incompetent and dependent upon charity, custodial care and protection [has become] firmly embedded in the public consciousness."[58]

As this brief demonstrates, the states, as employers, as licensors and as rehabilitators, share the prejudices of society at large. Arbitrary governmental action, however, is more pernicious than private discrimination: (1) it legitimates society's unfair consensus and (2) because such action is so often embodied in statutes and regulations, it is not easily remedied without litigation or concerted action. Such arbitrary and irrational action by state actors is precisely what the Fourteenth Amendment seeks to forbid. For these reasons, Congress was fully

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[56] (...continued)
thoroughly capable blind persons have never had a job." Daniel Finkelstein, *Blindness and Disorders of the Eye* 47 (Nat'l Federation of the Blind 1989).

[57] *1989 ADA Hearing, supra* note 26, at 74 (statement of Arlene Mayerson).

[58] *Id.* at 78.

justified in exercising its powers under that amendment to enact the Americans with Disabilities Act to redress these grievous wrongs.

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